

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 15 OF 2006.

1. Shri Vishwambhar P. Gaonkar
major of age, retired Asst. Teacher,
and his wife,
 2. Smt. Ila Vishwambhar Gaonkar,
major of age,
both residing at Askanwada,
Shiroda, Ponda, Goa.
- Appellants.

Versus

1. Shri Vishwanath Sinai Khandeparkar,
major of age, retired Govt. Servant,
resident of Shiroda, Ponda, Goa.
 2. Shri Laxmikant Sinai Khandeparkar,
major of age, retired Govt. Servant,
resident of Margao, Goa.
- Respondents.

Shri J. E. Coelho Pereira, Senior Advocate with Shri S.B. Karpe, Advocate for the Appellants.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Respondents.

CORAM: SMT. RANJANA DESAI, J.

DATE: 13th JULY, 2006.

ORAL JUDGMENT:

This second appeal is filed by the original defendants. The plaintiffs filed Regular Civil Suit No.144/92/B for a declaration and

injunction. The trial Court held that the plaintiffs are owners of half of the property, but since the plaintiffs had not identified the property the prayer for injunction was rejected. The trial Court however returned the finding that defendants 1 and 2 have no right, title and interest in the suit property. The plaintiffs carried an appeal to the court of IInd Ad-hoc Addl. District Judge, Panaji being Regular Civil Appeal No. 158/2004. The learned Judge declared that the plaintiffs are owners of the suit property and he restrained defendants 1 and 2 from interfering with the possession of the plaintiffs of the suit property. Being aggrieved by these judgments, the defendants have preferred this second appeal.

2. I have heard the learned counsel for the parties. The learned counsel for the appellants/defendants made a serious grievance that the first appellate court has without following the procedure under Order 41, rule 31 of the Code of Civil Procedure (Code for short) and without formulating or framing the points decided the appeal. He contended that there is no indication in the judgment that the learned Judge has considered the arguments advanced by the learned counsel for the parties in the light of the evidence on record. He submitted that the learned Judge has travelled beyond the scope of the plaint. While the plaintiffs had prayed for a declaration that the plaintiffs are owners of half portion of the suit property, the learned Judge has declared them to be owners of the

entire property. According to the learned counsel substantial questions of law are involved in this appeal. In support of his contention, the learned counsel relied on *Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179*.

3. Mr. Lotlikar, learned counsel for the plaintiffs, on the other hand, submitted that it is true that the first appellate court has not framed points. But on that count alone, it cannot be said that there is no proper consideration of the issues involved in the case. He submitted that a perusal of the judgment of the first appellate court would show that the learned Judge has reproduced the arguments of the counsel; he has referred to the evidence and given his verdict. There is indeed a substantial compliance of the provisions of Order 41, rule 31 of the Code. In support of his submission the learned counsel relied on *G. Amalorpavam and others v. R.C. Diocese of Madurai and others (2006) 3 SCC 224*.

4. In *Bashir Ahmed and others v. Abdul Rahman (dead) by L.Rs. And others (A.I.R. 2004 S.C. 3284)*, the Supreme Court was considering Section 100 of C.P.C. The Supreme Court held that it is not permissible for the High Court to interfere with the judgment of the Courts below under section 100 of the C.P.C. without formulating substantial question of law. It was also observed that the stipulation under Section 100 of the C.P.C.

as to the need to formulate a substantial question of law is mandatory and the failure to do so would vitiate the adjudication itself. In the circumstances, I admit the appeal. In deference to this judgment, it is incumbent on me to formulate the substantial question of law in this appeal. In my opinion the following substantial questions of law arise in the appeal :-

- i) As to whether the first appellate Court was right in disposing off the Appeal without following the mandate of Order 41 Rule 31 of C.P.C. without formulating and/or framing the points for determination and decide the Appeal without considering what were the questions required to be determined.
- ii) As to whether the first Appellate Court was right in decreeing the suit of the Plaintiff without considering material evidence on record.

5. Since the parties are represented by counsel, I proceed to hear the appeal finally.

6. The first appellate Court has not framed points. In **Santosh Hazari's** case (supra) while dealing with somewhat similar question the Supreme

Court held that the judgment of the first appellate Court must reflect conscious application of mind. The first appellate Court must record findings supported by reasons on all issues and contentions and when a doubt arises as to whether first appellate court has carried out its function correctly, such doubt itself may give rise to a substantial question of law.

7. In *G. Amalorpavam and others v. R.C. Diocese of Madurai and others* (2006) 3 SCC 224 the Supreme Court was again considering a similar question. The Supreme Court observed that :- “ the question whether in a particular case there is substantial compliance with the provisions of Order 41 Rule 31 C.P.C. has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 C.P.C. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient.” Reading of these two judgments make it clear that the mandate of Order 41, Rule 31 of C.P.C. has to be followed by the appellate Court. But it is possible that in a given case

the first appellate court may not follow it. Yet the second appellate Court may find substantial compliance with the said provisions, in the sense that though there is no framing of points the marshalling of evidence and the reasoning may be lucid and clear. In such case the second appellate court may not give much importance to the fact that the first appellate court has not framed points. But to fall in that category of judgments, the first appellate court's judgment must contain proper appreciation of facts and law and it must be easy to ascertain the findings. The question here is whether in this case it can be said that the learned Judge has done proper marshalling of evidence and given reasons for his findings.

8. From the judgment I find that though the learned Judge has referred to the arguments advanced by the counsel, he has not dealt with the arguments. The findings are sketchy and there is no marshalling of evidence. The learned Judge has undoubtedly referred to some documents. But he has not assigned any reason as to why he has taken a particular view or as to why he has rejected the submissions of the defendants. His ultimate order indicates that he has declared the plaintiffs to be owners of the entire suit property though it is possible to hold from a reading of some portions of the judgment that he was confining his reasoning to half portion. More clarity is required. I do not think that there is substantial compliance with Order 41 Rule 31 of C.P.C.

The impugned judgment is thus vulnerable.

9. In the circumstances, in my opinion, the matter needs to be remanded to the first appellate Court with a direction that within a time frame laid down by this Court, the first appellate court should hear the parties afresh and deliver the judgment after following the mandate of Order 41 Rule 31 of the Code. Hence the following Order :-

10. The impugned order dated 27.09.2005 is set aside. The matter is remanded to the first appellate Court with a direction that the first appellate Court will re-hear the parties, formulate points as required by Order 41 Rule 31 of C.P.C. and answer them. This exercise should be completed by it within a period of three months from the date of receipt of this order by it. It is clarified that on merits of the case, no opinion is expressed by this Court. The learned Judge shall deal with all the contentions independently. Parties shall appear before the first appellate court on 27th July, 2006.

Second Appeal is disposed of in the aforestated terms.

SMT. RANJANA DESAI, J.

sl.

